In The

Supreme Court of the United States

October Term, 1976

No. 76-1622

IN RE REINER INDUSTRIES, INC., DEBTOR

MARCUS ROTTENBERG,

Petitioner,

vs.

IRVING SULMEYER, TRUSTEE,

Respondent.

MARCUS ROTTENBERG,

Petitioner,

vs.

INTERNATIONAL FASTENER RESEARCH CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

~~A. WALTER SOCOLOW~~
~~EDWARD M. BERMAN~~

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vs.

INTERNATIONAL FASTENER RESEARCH CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Marcus Rottenberg, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on February 24, 1977.

OPINIONS BELOW

The unpublished opinion of the Bankruptcy Judge of the United States District Court for the Central District of California upon which the orders appealed from were predicated is printed in Appendix A. The unpublished opinion of the United States Court of Appeals for the Ninth Circuit is printed in Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on February 24, 1977 and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Was petitioner, a lien creditor of the Chapter XI Receiver with certain priorities and property rights created and vested in him by a bankruptcy court order entered on May 24, 1973, deprived of his rights and property without constitutional due process of law by said bankruptcy court's *ex parte* order of July 30, 1974 which created new liens and superior rights on the bankrupt's assets without notice to petitioner?

2. Was petitioner time-barred from appealing directly from the July 30, 1974 *ex parte* order which permitted the Trustee to rescind the fully executed court-confirmed private sale of limited assets of the bankrupt and directed a new public sale of all of the bankrupt's assets (including those not sold under the rescinded agreement) without notice and without waiving notice to the

bankrupt's creditors, particularly where, on July 29-30, 1974 the Trustee made affirmative representations to petitioner's counsel while at the same time he engaged in contrary secretive acts resulting in the *ex parte* order that destroyed petitioner's May 24, 1973 court-approved property rights in the bankrupt's assets?

3. Was the December 18, 1974 order appealable as constituting a determination on the merits of petitioner's application for reconsideration of the July 30, 1974 *ex parte* order, irrespective of the form in which the order was cast?

STATUTORY PROVISIONS INVOLVED

The case involves the following constitutional provisions, statutes and rules:

United States Constitution Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation." (Emphasis supplied.)

30 Stat. 555, 11 U.S.C. §67(a)(1):

> "§67. Duties of referees; prohibition against practice of law and acting as trustees or receivers; review of orders

(a) Referees shall (1) give notice to creditors and other parties in interest, as provided in this title; . . ."

74 Stat. 528, 11 U.S.C. §67(c):

"§67. Duties of referees; prohibition against practice of law and acting as trustees or receivers; review of orders

• • •

(c) A person aggrieved by an order of a referee may, within ten days after the entry thereof or within such extended time as the court upon petition filed within such ten-day period may for cause shown allow, file with the referee a petition for review of such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing. Such petition shall set forth the order complained of and the alleged errors in respect thereto. Unless the person aggrieved shall petition for review of such order within such ten-day period, or any extension thereof, the order of the referee shall become final. Upon application of any party in interest, the execution or enforcement of the order complained of may be suspended by the court upon such terms as will protect the rights of all parties in interest."

52 Stat. 867, 11 U.S.C. §94(a)(4):

"§94. Notices

(a) Creditors shall have at least ten days' notice by mail, to their respective addresses as they

appear in the list of creditors of the bankrupt or as afterward filed with the papers in the case by the creditors, of . . .

(4) all proposed sales of property: *Provided*, that the court may, upon cause shown, shorten such time or order an immediate sale without notice; . . ."

52 Stat. 909, 11 U.S.C. §744:

"§744. Issuance of certificates of indebtedness

During the pendency of a proceeding for an arrangement, or after the confirmation of the arrangement where the court has retained jurisdiction, the court may upon cause shown authorize the receiver or trustee, or the debtor in possession, to issue certificates of indebtedness for cash, property, or other consideration approved by the court, upon such terms and conditions and with such security and priority in payment over existing obligations as in the particular case may be equitable."

Bankruptcy Rule 802(a):

"(a) Ten-Day Period. The notice of appeal shall be filed with the referee within 10 days of the date of the entry of the judgment or order appealed from. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 10 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this rule, whichever period last expires."

STATEMENT OF THE CASE

The following facts are material to the consideration of the questions presented:

1. Petitioner made loans to the Bankruptcy Act Chapter XI Receiver of the debtor in accordance with statute and the bankruptcy court order entered on May 24, 1973.

2. The Receiver issued to petitioner Certificates of Indebtedness evidencing said loans, in form approved by the bankruptcy court, which granted priorities and created certain lien rights in petitioner's favor against the Chapter XI debtor's assets in that proceeding and in any subsequent bankruptcy proceeding.

3. On February 2, 1974, after petitioner's Certificates of Indebtedness had matured and remained unpaid, the Chapter XI proceeding terminated, the debtor was adjudicated a bankrupt and the Chapter XI Receiver was succeeded by a Trustee in Bankruptcy ["Trustee"] (the same individual served in both fiduciary capacities). The Trustee continued operating the business of the bankrupt.

4. On July 12, 1974 the Trustee sold and conveyed certain, limited, assets of the bankrupt at private sale without notice to creditors, as authorized by court order, and received the full stipulated consideration therefor from the contract vendee, respondent International Fastener Research Corporation ("IFR"). IFR immediately took over the sold assets, and began operating the bankrupt's business for IFR's own account and benefit. No provision of the underlying sales agreement remained to be performed. The sales agreement did not contain a rescission provision.

5. On July 24, 1974, the Trustee filed adversary proceedings against petitioner to determine priorities in said sales proceeds

and in the bankrupt's remaining assets; the court thereupon issued a summons requiring petitioner to answer by August 19, 1974 and set the hearing therein for August 30, 1974.

6. Petitioner was satisfied with the sale to IFR, and relied upon the plain priorities accorded to him by his Certificates of Indebtedness for his senior rights in the contract consideration paid by IFR and in the remaining assets of the bankrupt. Only his priorities in those assets remained to be fixed in the adversary proceeding.

7. On July 29, 1974, the Trustee wrote to petitioner's counsel concerning said adversary proceeding and promised to keep counsel abreast of all developments in the bankruptcy proceedings. As a Chapter XI creditor of the Receiver, petitioner had no need to resort to or continually search the court file in the bankruptcy proceedings. His only interest was his 1973-established property and lien rights in the bankrupt's assets and his priority right of reimbursement therefrom, which was to be determined in the adversary proceeding.

8. The Trustee failed to tell petitioner's counsel, however, that he, the Trustee, had prepared an application on the very same day (July 29, 1974), on behalf of himself and IFR to have the court approve rescission of the sale, to have *all* of Reiner's assets (not merely those sold under the Agreement) sold to repay the sales consideration to IFR, and to have subrogation and lien rights imposed in favor of IFR upon *all* of Reiner's assets (even those not sold to IFR) senior to petitioner's priority lien — in effect, to eliminate substantially all of the assets available to the Receiver's creditors which were the subject matter of the adversary proceeding.

9. On July 30, 1974, the Bankruptcy Judge made an *ex parte* order upon said application which vacated the private sale, created new property rights in favor of IFR against all of the bankrupt's assets (including those which had not been sold to

IFR), directed the public sale of the bankrupt's assets without notice and without waiving notice to the bankrupt's creditors, created superior lien and subrogation rights in all said assets in favor of IFR, and subordinated petitioner's Chapter XI-created vested property and lien rights to IFR and to all other creditors of the Trustee.

10. When petitioner's counsel went to court in connection with the adversary proceeding, which was rendered almost entirely moot by the July 30, 1974 *ex parte* order, he discovered the July 30, 1974 *ex parte* order; petitioner promptly sought reconsideration thereof.

11. On September 9, 1974, the bankruptcy court made an order that it would reconsider its July 30, 1974 *ex parte* order and conduct hearings with respect thereto. Testimony and proof were adduced at two hearings; extensive memoranda of law were filed by opposing counsel arguing the merits of said order.

12. On November 14, 1974, the bankruptcy court rendered a 7-page opinion (Appendix A hereto) which analyzed and reaffirmed its July 30, 1974 *ex parte* order on the merits, and determined petitioner's Chapter XI Certificates of Indebtedness priority and lien rights in whatever assets of the bankrupt might remain after the new rights created under the July 30, 1974 *ex parte* order were satisfied.*

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* The underlying sales agreement between the Trustee and the vendee, respondent IFR, did not contain any subrogation provision. The agreement expressly merged all oral understandings and negotiations into itself, stated that it constituted the parties' entire understanding, and prohibited oral modifications. IFR contended there was an oral, contingent, retroactively effective subrogation agreement with the Trustee. The Bankruptcy Judge rejected that contention *sub silencio*, but upheld the subrogation rights created by the *ex parte* order in favor of IFR solely upon California equity law (Appendix A, page 4a, *supra*). In reviewing the facts, the United States Court of Appeals for the Ninth Circuit erroneously stated that subrogation had been agreed upon (Appendix B, page 12a, *supra*).

13. On December 18, 1974, the bankruptcy court made an order determining petitioner's reconsideration motion, pursuant to said opinion. Notwithstanding the September 9, 1974 order and the November 14, 1974 on-the-merits opinion (Appendix A), the order was cast in the form of a "denial of application to reconsider" the July 30, 1974 *ex parte* order. Petitioner appealed therefrom claiming that the September 9, 1974 order granted reconsideration, that evidence was adduced and extensive argument had in respect of the issues, that the opinion actually reaffirmed the *ex parte* order on the merits, and that the order entered as directed in the opinion was substantive and appealable, irrespective of the form it took, and subjected the underlying *ex parte* order to review.

14. On January 2, 1975, the bankruptcy court made an order determining that petitioner's Chapter XI Certificates of Indebtedness vested property rights in whatever assets of the bankrupt might remain after the new rights created by the July 30, 1974 *ex parte* order were satisfied would be subordinate to all of the Trustee's creditors. Petitioner appealed therefrom.

REASONS FOR GRANTING THE WRIT

The court of appeals rendered a decision which conflicts with applicable decisions of this court. Special and important reasons require review by the Supreme Court of the United States.

A. Constitutional principles rendered the July 30, 1974 *ex parte* order nugatory and precluded application of the ten-day review time bar of 11 U.S.C. §67(c) and Bankruptcy Rule 802(a) to petitioner's property and priority rights as a creditor of the Receiver.

Petitioner had vested property rights in the bankrupt's assets, which at July 30, 1974 were comprised of the contract

consideration paid by IFR for specified assets of the bankrupt, and the remaining assets of the bankrupt not sold to IFR.

The real effect of the Trustee's July 29-30, 1974 *ex parte* application was to seek judicial elimination of the contract consideration fund, and of the bankrupt's remaining assets, which were the subject of the adversary proceeding commenced by the Trustee on July 24, 1974, which was to be heard on August 30, 1974.

The proposed disposition of the contract consideration fund was no different from the proposed sale of any other property, as to which notice to petitioner and to all other creditors was required by 11 U.S.C. §94(a)(4). The proposed sale at public auction of assets of the bankrupt to generate funds sufficient to repay the contract consideration to IFR — including the sale of assets not sold to IFR — was one requiring notice to petitioner and all other creditors [11 U.S.C. §94(a)(4)].

The bankruptcy court's July 2, 1974 order authorized the private sale of specified, limited, assets of the bankrupt without notice to creditors. However, the sale contemplated by the July 29-30, 1974 *ex parte* application was a public sale of substantially all of the bankrupt's assets, including those not included within the compass of the July 2, 1974 order. The ensuing July 30, 1974 *ex parte* order did not shorten the ten-day notice requirement of 11 U.S.C. §94(a)(4) or waive such notice for good cause shown; the July 2, 1974 order was ineffective for that purpose.

Moreover, the petitioner, as a court-created prior lienholder, was entitled, upon the plainest principles of justice and equity, to contest the necessity, validity and effect of (a) the ground asserted for setting aside the sale and thereby ousting him of his vested rights (i) in the proceeds thereof, and (ii) in the assets of the bankrupt not sold to IFR, (b) the oral subrogation agreement alleged by the Trustee, and (c) the creation of super

priority lien rights in favor of IFR on *all* of Reiner's assets. Petitioner's valid subsisting lien could not be affected without notice to him or his consent. *Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U.S. 434, 439 (1886); *Coursey v. International Harvester Co.*, 109 F.2d 774 (10th Cir. 1940); *Nicholson v. Western Loan & Building Co.*, 60 F.2d 516 (9th Cir. 1932); *Northwest Marine Works v. United States*, 307 F.2d 537 (9th Cir. 1962); *In re Mannington Pottery Co.*, 104 F. Supp. 506 (N.D. W. Va. 1952).

The Supreme Court has reaffirmed constitutional due process in an increasing variety of cases. The basic doctrine has been applied not only to *ex parte* judicial action but also to proceeding under administrative law as well as to unilateral exercise of legal rights by private citizens. Bankruptcy rules may not be construed, as did the courts below, to sanction violation of petitioner's essential constitutional rights to notice of any procedural impact on his property rights. Moreover, petitioner's judically-created special status as a lienor under the Receiver's Certificates of Indebtedness should not have been adversely affected below by the imposition of time bars which relate to routine steps in bankruptcy proceedings applicable to general creditors of a bankrupt whose debts arose prior to such proceedings.

Constitutional procedural due process inexorably required notice to petitioner and an opportunity for him to be heard before his property rights could be modified, abrogated or destroyed *ex parte*. *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337 (1969); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Laing v. United States*, 423 U.S. 161 (1976); *Hanley v. Four Corners Vacation Properties, Inc.*, 480 F.2d 536 (10th Cir. 1973); *Klim v. Jones*, 315 F. Supp. 109 (N.D. Cal. 1970); and *Straley v. Gassaway Motor Company, Inc.*, 359 F. Supp. 902 (S.D. W.Va. 1973). The July 30, 1974 order was constitutionally and otherwise defective and void.

B. Equitable principles, as well as constitutional due process concepts of fair play, estopped the Trustee and IFR from asserting that the ten day time bar of U.S.C. §67(c) and Bankruptcy Rule 802(a) was applicable to petitioner who was a lien creditor of the Receiver.

It is respectfully contended that the duplicity of the Trustee, acting for IFR — making affirmative statements and assurances to petitioner's counsel by July 29, 1974 letter designed to keep the latter off-guard, away from the court file, and concerned only with the August 30, 1974 adversary proceeding hearing, while the Trustee was on the same day furtively proceeding *ex parte* to eliminate and put beyond petitioner's reach the very assets which were the subject of that adversary proceeding — created an equitable estoppel barring the Trustee and IFR from asserting the applicable ten-day time bar which was born out of those tainted acts.

C. The December 18, 1974 order was predicated upon the Bankruptcy Judge's lengthy on-the-merits opinion, following hearings and extensive legal arguments by adversary counsel after the bankruptcy court's September 9, 1974 order which expressly granted reconsideration of the July 30, 1974 *ex parte* order, and was appealable irrespective of its form. *Smith v. Hill*, 317 F.2d 539 (9th Cir. 1963); *In re Brendan Reilly Associates, Inc.*, 372 F.2d 235 (2d Cir. 1967); *In re Casco Fashions, Inc.*, 346 F. Supp. 1252 (S.D.N.Y. 1972).

D. It was error, in any event, for the July 30, 1974 *ex parte* order to direct that assets of the bankrupt, other than those which had been sold to IFR, be sold for purposes of reimbursing IFR from the proceeds of such sale for the contract consideration it had paid. *Dayton v. Hanard*, 241 U.S. 588 (1918).

In summary:

No one but petitioner would lend funds to the Chapter XI debtor, and he did so only because of the protections and property rights accorded to him by the court-approved Certificates of Indebtedness issued by the Receiver. He was entitled to notice of the application made *ex parte* by the Trustee, on behalf of IFR, resulting in the July 30, 1974 order which had the effect of disposing of substantially all of the bankrupt's assets in which petitioner had vested property rights. The ten day time bar cannot be availed of by the Trustee or IFR who perverted it to their use by duplicity. In any event said time bar should not have been applied to petitioner who was a lien creditor of the Receiver rather than a pre-insolvency creditor of the bankrupt. The December 18, 1974 order was, in substance, one on the merits after reconsideration was granted, and was appealable, subjecting the July 30, 1974 *ex parte* order to review.

CONCLUSION

For the foregoing reasons, petitioner, Marcus Rottenberg, respectfully prays that this petition for certiorari be granted.

Respectfully submitted,

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EDWARD M. BERMAN

ALLAN J. GREENBERG and
A. WALTER SOCOLOW
Attorneys for Petitioner,
Marcus Rottenberg

APPENDIX A — LETTER DECISION OF BANKRUPTCY JUDGE

November 14, 1974.

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In re: Reiner Industries, Inc.
In Bankruptcy #73-05066

Gentlemen:

There are two matters in connection with the above-entitled case now under submission. The first one is whether or not this court should reconsider its order of July 30, 1974 declaring rescission of an order of private sale of the assets of the above-named bankrupt, which private sale had been authorized by the court on July 2, 1974 after unsatisfactory bids had been submitted at a sale in open court following due notice to creditors as required by law.

A private sale was made by the trustee on July 12, 1974 which was amazing to the court, since Mr. Reiner, former president of the bankrupt, claimed to own the patents used by

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the bankrupt and litigation on that point had not been concluded at that time. This private sale was confirmed by the court to International Fastener Research Corp. (hereinafter referred to as IFR) according to the terms of an agreement which contained a proviso that the sale be approved by Court Order no later than July 12, 1974 and such order "becomes final for all purposes no later than July 23, 1974". On July 12, IFR gave the trustee one million dollars and the trustee used said monies to pay off certain secured creditors and IFR took possession of the debtor's assets and premises. On the ninth day after the Order approving the sale was entered, Kenneth Reiner, former president of the bankrupt and a creditor, filed a notice of appeal as authorized by Bankruptcy Rule 802(a). Immediately thereafter IFR gave notice of rescission because the above-mentioned proviso in the sales agreement had not been fulfilled.

The trustee was quite right in recognizing IFR's right to rescind. IFR is well represented by counsel and certainly when it parted with one million dollars, it had a right to lay down the conditions it did. As a result of this rescission, and still under order of court to sell at private sale, the trustee asked the court for an order rescinding the sale approved on July 12 and providing for a compromise with IFR. Said order of rescission is dated July 30, 1974 and it is this order that the applicant, Marcus Rottenberg, receiver's certificate holder to the extent of $350,000.00, seeks to have reconsidered by the court because it was done ex parte, among other things, but principally because it subrogates IFR to the secured creditors paid off out of the one million dollars it paid on July 12.

The applicant, Rottenberg, is an aged uncle of Kenneth Reiner, former president and principal of the debtor, and who bought two receiver's certificates totaling $350,000.00 at the urging of his nephew and contrary to the advice of his attorney, Allan Greenberg, which certificates were authorized by the

Appendix A

Court, the contents of which speak for themselves. The second question posed to the court involves their interpretation and status.

All through the proceedings since Rottenberg bought the receiver's certificates, his counsel, Allan Greenberg, a very able attorney, has been in contact with the receiver, who became trustee after adjudication. At all times Mr. Greenberg was aware of the trustee's difficulties in operating the debtor-bankrupt's business so it could be sold as a going concern, despite the obstacles placed in his way by Mr. Reiner, who claimed to own patent rights on the hair clips manufactured by the debtor, forcing the trustee to engage in prolonged litigation before the undersigned Bankruptcy Judge, and then appealing to the District Judge after an adverse ruling. Incidentally, the ruling that the patents belonged to the debtor was affirmed by the District Judge. Also, the appeal of Mr. Reiner from the sale of July 12 was dismissed by the District Judge. The trustee has testified that had it not been for Mr. Reiner's obstruction, this business, which was quite viable, could have been sold for two million dollars which would have paid off practically everybody connected with the case.

It is true that Mr. Rottenberg, through Mr. Greenberg, never told the trustee to continue to operate the bankrupt's business when it appeared to be a losing proposition, but he never asked the trustee to close it down either — and rightfully so. The court was aware of the danger of continued operation but was advised of the opportunity to sell the business as a going concern by the trustee who was negotiating with IFR for some time before July 12. Mr. Greenberg realized, I am sure, that the only hope of Mr. Rottenberg's recovery of his $350,000.00, to say nothing of interest, was to sell this viable salable business, as a going operation. To shut it down was to abandon all hope of a fair recovery. These facts were known to all concerned all along the tortuous path of the administration of this case.

Rottenberg complains that he had a senior lien by reason of his receiver's certificates under the order of July 12. Despite the pleas of the trustee to get Mr. Greenberg and, in turn, Mr. Rottenberg to persuade Mr. Reiner to dismiss his appeal from the Order of July 12, Mr. Reiner refused and the Order of July 30 became necessary. As to formal notice, I don't think Mr. Rottenberg was entitled to notice of the order of July 30 any more than he was to the order of July 12 entered pursuant to an order of private sale.

Mr. Rottenberg claims he lost the senior lien he had on the assets of the bankrupt under the order of July 12 by the order of July 30, which he wants reconsidered since the time for appeal has long since expired. It is his contention that he lost his senior lien because the Order of July 30 subrogates IFR to the secured creditors who were paid off by the trustee with IFR's million dollars. I can't imagine a result more unjust and I don't believe the law compels such an outcome.

"Subrogation does not necessarily depend on contractual relations. It is considered the creature of equity, and is so administered as to secure justice without regard to form. Accordingly, the right of subrogation can be invoked only when justice demands its application and the one asking subrogation has a greater equity than those who oppose him. The application of the doctrine must depend on the circumstances of each case.***" 46 Cal. Jur. 2d, p. 67. In this case, in the judgment of this court, IFR has a greater equity than Rottenberg.

The provisions for auction are a part of the authorized private sale which had to be compromised — thus no notice to creditors is required by law.

Consequently, the Application to Reconsider the Order of July 30, 1974 should be denied. Counsel for IFR will prepare,

serve and submit the documentation to formalize this announcement of ruling.

The court will add that it is difficult to see wherein Mr. Rottenberg is in any worse position after the Order of July 30 than he was before.

The second question before the court is the trustee's complaint to determine priority of operating expenses over the Receiver's Certificates of Indebtedness, filed July 24, 1974. In determining this question the receiver's certificates must be viewed in their entirety in the "cool light of reason" giving due consideration to their purpose and the circumstances as they existed at the time they were issued.

This case was filed under Chapter XI on May 9, 1973. The business was closed. It had an indebtedness, according to the schedules filed July 9, 1973, totaling $3,292,426.54 of which $1,673,987.62 was secured. Unpaid wages totaled $69,202.36; unpaid taxes amounted to $186,458.95. It had claimed assets of $3,579,077.23, among which was $1,030,873.89 in accounts receivable pledged to A.J. Armstrong Co. The schedules speak for themselves and reflect the rather sorry condition of this business. However, the debtor manufactured and sold patented hair clip and rollers nationwide under the trade name "Lady Ellen" and in Canada as well. The items were in demand, and were sold in chain stores throughout the country. The market for the product was good; it was mass produced and sold at low cost to women who found the hair clips particularly useful and a big improvement over the old style hair pin.

The $350,000.00 was needed by the receiver to open the business and Mr. Reiner prevailed upon his aged uncle, Marcus Rottenberg, of New York to buy the two receiver's certificates in question against the advice of Mr. Greenberg, his local attorney. The two certificates were authorized by the court and the

certificates were issued on May 24, 1973, one for $100,000.00 and one for $250,000.00. The money was used by the receiver who later became trustee after adjudication.

For some undefinable reason, many people seem to feel that there is something sanctified about a receiver's certificate just as some people believe that when the Bankruptcy Court retains jurisdiction after a plan under Chapter XI is approved, the plan is bound to work out.

A receiver's certificate gives nothing except what is provided in its terms and its eventual value is dependent upon the success of the receiver's operations.

The certificates speak for themselves, however, it should be noted that the lien of Mr. Rottenberg was expressly made subject to pre-existing liens and security interests and particularly in security interests and encumbrances in present and future accounts and inventory of the Debtor and Receiver in favor of A.J. Armstrong Co., Inc. Mr. Rottenberg's lien was made senior to all expenses of administration in the Chapter XI proceeding *and in any superceding bankruptcy proceeding* except for the Referee's Salary and Expense Fund. In spite of this seniority the certificate provided that the lien was subject to depletion for current operating purposes and the Receiver may pay ahead of the lien any costs or expenses incurred by him in connection with his operation of the debtor's business.

To this court, this means that Mr. Rottenberg's lien is behind the Referee's Salary and Expense Fund and expenses of the Receiver who later became trustee in operating the business of the debtor. As it is, and unless the trustee can recover additional assets in huge amounts, and there are some other assets, the receiver-trustee and his attorney who has worked hard and manfully in this case will receive nothing because of

Mr. Rottenberg's lien. At no time during the course of the administration of this estate has Mr. Rottenberg demanded of the receiver-trustee to return or asked this court to order the return of the money he advanced on these certificates, even though all along Mr. Greenberg knew that the trustee was operating this business. No objection whatever was raised to the operations of the trustee by Mr. Greenberg, and wisely so, because it was plain to see the only hope of a complete recovery by Mr. Rottenberg was the sale of this business as an operating business.

For this court on this record to conclude that Mr. Rottenberg was entitled to be paid ahead of the operating expenses of the trustee would expose the receiver-trustee to a liability for actions he took with, at least, the tacit approval of Mr. Greenberg, to save Mr. Rottenberg's rather foolish investment than to destroy it. The words "superceding bankruptcy proceeding" is mentioned in the certificates. That means to me that the trustee's expenses of operation are ahead of Mr. Rottenberg's lien. To reach any other result in this situation would be as unjust as a reconsideration of the order of July 30, 1974, in my considered judgment.

The trustee relied upon the order of July 12 in paying off the secured creditors. Mr. Rottenberg had no vested right created by the order of July 12. Any right he had by reason of that order was contingent upon the order becoming final. It never did become final for a good reason. Unless there is a case *directly* to the contrary on the issues presented here, it is clear to me that law and equity demand the results heretofore stated. I know of no such case as I read the cases.

Therefore, counsel for the trustee shall prepare, serve and submit the necessary documentation to formalize this

Appendix A

announcement of ruling on the question of priority of operating expenses over Mr. Rottenberg's lien.

Yours very truly,

HOWARD V. CALVERLEY
Bankruptcy Judge

HVC:jp

cc: Mr. Irving Sulmeyer
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APPENDIX B - OPINION OF UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re Reiner Industries, Inc.

Debtor.

MARCUS ROTTENBERG,

Applicant-Appellant,

vs. No. 75-2482

IRVING SULMEYER, TRUSTEE,

Respondent-Trustee.

MARCUS ROTTENBERG,

Applicant-Appellant,

No. 75-2483

vs.

MEMORANDUM

INTERNATIONAL FASTENER RESEARCH CORPORATION,

Respondent-Appellee.

[February , 1977]

Appendix B

Appeal from the United States District Court for the Central District of California

Before: HUFSTEDLER and GOODWIN, Circuit Judges, and KING,* District Judge.

FACTS

These two cases involve the appellant Marcus Rottenberg's claim that his rights under two certificates of indebtedness were prejudiced by orders entered by the bankruptcy judge after the debtor for whose benefit the certificates were issued was adjudicated a bankrupt.

In May, 1973, Reiner Industries entered Chapter XI proceedings and Irving Sulmeyer was appointed Receiver. Since all concerned felt that the on-going value of the corporation exceeded its liquidation value, the Receiver looked around for an infusion of cash which would keep the corporation going until it could get back on its feet. Kenneth Reiner, the founder of Reiner Industries persuaded the appellant, his uncle, to loan the Receiver $350,000 in return for two certificates of indebtedness issued pursuant to §344 of the Bankruptcy Act, 11 U.S.C.A. §744 (1970). Each certificate provided in part that:

> This certificate is by said order made a lien upon all property of every kind or nature of Reiner Industries, Inc., the above-named Debtor, now or hereafter coming into the possession of Irving Sulmeyer, the undersigned Receiver (or into the possession of any successor trustee in bankruptcy), or to which the undersigned Receiver (or any successor trustee in bankruptcy)

* Honorable Samuel P. King, Chief United States District Judge for the District of Hawaii, sitting by designation.

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> may acquire title, or the proceeds thereof. Said lien shall be subject to presently existing valid and perfected security interests, trust deeds, liens and other encumbrances, including but not limited to the security interests and encumbrances in the present and future accounts and inventory of the Debtor and Receiver in favor of A.J. Armstrong Co., Inc.; it shall be senior to all expenses of administration in this Chapter XI proceeding and in any superceding bankruptcy proceeding except that said lien shall be junior to charges assessed by the Court for the Referee's Salary and Expense Fund. Notwithstanding the foregoing, the lien of this certificate is subject to depletion for current operating purposes, and the Receiver may pay ahead of the lien of this certificate any costs or expenses incurred by him in connection with his operation of the Debtor's business. . . .

Although the appellant extended the dates of repayment for one month, the additional operating time provided by the loan came to nothing. In late 1973, the Receiver defaulted and the debtor was adjudicated a bankrupt on February 2, 1974.

Sulmeyer, now the trustee in bankruptcy, tried unsuccessfully to sell the business as a going concern in the spring of 1974. On July 2, 1974, after the bankruptcy court rejected an open court bid for certain business assets and a separate bid for stock in a subsidiary of the debtor, Sulmeyer was authorized "to sell said assets at private sale as expeditiously as possible, without further notice to creditors or other parties in interest and without further advertising. . . ." The appellant, through his counsel, was aware of this authorization.

On July 12, Sulmeyer signed an agreement with International Fastener Research Corporation ("IFR") whereby

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IFR agreed to purchase most of the assets of Reiner for $862,000. IFR additionally agreed to loan $138,000 to the Trustee, repayable only if IFR resold the assets at a profit.[1] The agreement provided that it would not be operable unless the court's approval of the agreement became "final for all purposes no later than July 23, 1974." Although the agreement would not be effective until that time, IFR agreed to deposit the $1,000,000 with the trustee on July 12, 1974, so that secured creditors of Reiner Industries could be paid without the estate incurring further interest charges. It was agreed that IFR would be subrogated to these creditor's rights in the event that the sale was not consummated. On July 22, 1974, Kenneth Reiner appealed from the July 12 order approving the sale to IFR. Pursuant to the sale agreement, IFR elected to rescind on July 26, 1974, because the order had not become final by July 23.

No. 75-2483

On July 30, 1974, the trustee obtained an order (the "July 30 order") approving the rescission, authorizing a public auction of the business assets, and confirming IFR's subrogation rights to the first million dollars received from that sale. No appeal was filed and this order became final on August 10, 1974. On September 9, 1974, appellant objected to the subrogation of IFR to the rights of creditors senior to appellant and moved for a reconsideration of the July 30 order. On December 18, 1974, the motion to reconsider the order was denied. Rottenberg appealed both the July 30 order and the denial of reconsideration of that order to the district court. Both appeals were dismissed. In No. 75-2483, Rottenberg asks us to review those dismissals.

1. Under Article II of the sale agreement, IFR agreed to pay the Trustee 50 to 75% of the resale profits, after certain expenses. Record on Appeal at 25. The certificate of indebtedness issued by the Trustee for the $138,000 loan by IFR provided that it would be only payable out of the payments made to the trustee under Article II. Record on Appeal at 37. Thus, the loan was repayable only if IFR resold at a profit.

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No. 75-2482

During July, 1974, while the Trustee still thought that the sale would be consummated, he instituted an action against appellant Rottenberg to determine Rottenberg's priority vis-a-vis other creditors of the bankrupt. On January 2, 1975, the bankruptcy judge ruled that Rottenberg stood behind the costs and expenses of the Receiver and the trustee incurred in the operation of the debtor's and the bankrupt's business. The district court affirmed and Rottenberg appeals from that decision in No. 75-2482.

DISCUSSION AND DISPOSITION

No. 75-2483

Before considering the merits of Rottenberg's objections to the July 30 order, we face the preliminary question of whether or not Rottenberg prosecuted a timely appeal. Both the bankruptcy judge and the district court concluded that Rottenberg's objection was not timely because he failed to file a notice of appeal within ten days of the entry of the July 30 order. We agree.

Bankruptcy Rule 802 requires that all appeals from the orders of referees be filed within ten days of the entry of the order. Rottenberg claims that this rule cannot be applied to him because he had no notice of the entry of the July 30 order. Although there is some dispute as to whether or not Rottenberg's attorney did receive notice, the district court proceeded on the assumption that Rottenberg did not have notice of the order.[2] Nevertheless, the court found that the lack of notice of the entry of the order did not affect the time in

2. Reporter's Transcript of Proceedings, United States District Court, Central District of California, April 9, 1975, at 45, lines 21-22.

which the appeal should have been filed. This decision comports with Bankruptcy Rule 922.

It is the duty of each individual creditor with notice of a bankruptcy proceeding to keep track of those proceedings by constantly checking the record in order to ensure that any order which affects him is properly challenged. *In re St. Cloud Tool & Die Co.*, 553 F.2d 387 (8th Cir. 1976); *In re General Insecticide Co., Inc.*, 403 F.2d 629 (2d Cir. 1968). A referee may file hundreds of orders in one bankruptcy proceeding and it is nearly impossible for him to notify every creditor who could be possibly affected.[3] This ten-day limit for appeals promotes the finality of bankruptcy orders. *In re Abilene Flour Mills Co., Inc.*, 439 F.2d 937 (10th Cir. 1971); *St. Regis Paper Co. v. Jackson*, 369 F.2d 136 (5th Cir. 1966). Without such finality, title to the property of the bankrupt would be clouded and it would be difficult for the trustee to liquidate the estate for the benefit of all creditors.

Rottenberg claims that the ten-day limit, as applied to him, violates his fifth amendment due process rights if his lack of notice of the order is not taken into account. Assuming that appellant had a property right which was affected by the July 30 order, we find this argument unpersuasive. Due process only requires a reasonable procedure to be followed when rights are affected. As noted previously, in a bankruptcy context it is reasonable to require a creditor to keep himself informed of the state of the proceedings. *St. Regis Paper Co. v. Jackson, supra.* Further, appellant waived his right to notice of the July 30 order declaring rescission, subrogating IFR, and authorizing a further

3. The appellant's citation to *In re* Harbor Tank Storage Co., Inc., 385 F.2d 111 (3d Cir. 1967) and *In re* Intaco Puerto Rico, Inc., 494 F.2d 94 (1st Cir. 1974) for the proposition that a creditor does not have such a duty is inapposite. Those cases only allowed a creditor to file a late claim in a Chapter X reorganization when the creditor had never been legally notified of the entire reorganization proceedings.

sale since he failed to object to the waiver of notice for good cause shown and authorization of sale contained in the July 2, 1974 order. After waiving notice of the sale agreement to IFR, he was not entitled to notice of the rescission of the sale agreement and authorization of further sale.[4] Finally, by appellant's own admission, he was aware of the July 30 order by August 30, 1974, more than ten days before the sale authorized by that order took place. Appellant failed to file his complaint until the day before the auction, and the parties involved in the sale were not notified until after the auction took place. In such circumstances, appellant should be estopped from asserting his lack of notice. *Cf. In re Imperial "400" National, Inc.*, 391 F.2d 163, 169 (3d Cir. 1968); *Connelly v. Hancock, Dorr, Ryan, & Shove*, 195 F.2d 864, 868 (2d Cir. 1952). We conclude that the ten-day limit contained in Bankruptcy Rules 802 and 922 as applied does not violate appellant's fifth amendment due process rights.

Rottenberg also appealed from the bankruptcy judge's denial of Rottenberg's motion to grant reconsideration of the July 30 order. The denial of a motion to reconsider a previous order is not an appealable order. *Wayne United Gas Co. v. Owens-Illinois Glass Co.*, 300 U.S. 131, 137-38 (1937); *In re Brendan Reilly Associates, Inc.*, 372 F.2d 235 (2d Cir. 1967). *See* 2A Collier on Bankruptcy, ¶ 39.17 at 1487 (14th ed. 1974). Appellant argues that although the form of the order of December 18, 1974, indicates that the referee simply denied his motion, he actually undertook to re-examine the merits of his July 30 order by taking evidence concerning that order. If the referee had implicitly granted the motion and was in fact reconsidering his July 30 order, the argument might have merit.

4. Appellant's reliance on Allgair v. William F. Fisher & Co., 143 Fed. 962 (3d Cir. 1906), is misplaced. That case dealt with a waiver of further notice of sale if the sale occurred within a certain time period. For a sale beyond the sale period, a new waiver was required.

Pfister v. Northern Illinois Finance Corp., 317 U.S. 144, 150-51 (1942). However, the referee listened to submissions about the order while reserving his decision as to whether or not he should grant reconsideration.[5] Whenever someone asks for reconsideration, the grounds for that motion are necessarily entwined with the merits of the controversy. A referee must be able to at least examine the grounds for reconsideration without actually "reaching the merits;" otherwise, party could force him to reconsider merely by moving for reconsideration.

The form of the referee's final order determines whether it resulted from a reconsideration of the earlier order, and hence is appealable, or whether it is a nonappealable denial of the motion to reconsider. *Pfister v. Northern Illinois Finance Corp., supra.* Although appellant argues that the judge was somehow tricked into signing the wrong order, the record indicates that the judge knew precisely what he was doing by not reaching the merits. The denial of the motion to reconsider is not an appealable order.

Therefore, in No. 75-2483 the decision of the district court dismissing the appeal from the July 30 order as untimely and dismissing the appeal from the denial of the motion to reconsider as a non-appealable order is affirmed.

No. 75-2482

Rottenberg's appeal from the district court's ruling which affirmed the bankruptcy court's order subordinating Rottenberg's claim to certain operating costs and expenses was timely filed and is properly before this court.

Rottenberg's claim is based on the certificates of

5. Reporter's Transcript of Proceedings before the Hon. Howard V. Calverley, November 8, 1974, pp. 79-82.

indebtedness issued by Sulmeyer pursuant to §344 of the Bankruptcy Act, 11 U.S.C.A. §744 (1970). In *White Chemical Co. v. Moradian*, 417 F.2d 1015 (9th Cir. 1969), this court concluded that §344 authorizes a Chapter XI Receiver to grant special and fixed priorities for certificates of indebtedness. These priorities can be senior to both past and future creditors in the Chapter XI proceedings. *Id.* at 1019-20. In dictum, this court also stated that such priorities are "subject of course to the 'super priority' given costs in the superceding bankruptcy [by section 64(a)(1), 11 U.S.C.A. §104(a)(1) (Supp. 1976)]." *Id.* at 1018. Thus, a certificate of indebtedness can provide a priority for the holder over all other creditors in the Chapter XI proceeding. However, this court has indicated that such a certificate probably cannot provide for a priority over those bankruptcy costs listed in §64(a)(1) of the Act in the superceding bankruptcy proceedings.

Against this background, we turn to the specific language of the certificates as quoted in the first paragraph of this opinion in order to ascertain the nature of the priority which Rottenberg obtained. One notices a number of ambiguities in the certificates. They make Rottenberg's claim senior to the administrative expenses of both the Chapter XI and the superceding bankruptcy proceedings, but then turn around and subject the lien to "depletion" for current operating purposes at least during the Chapter XI proceeding and perhaps also during the subsequent bankruptcy period.

The bankruptcy judge interpreted the certificate to mean "that Mr. Rottenberg's lien is behind the Referee's Salary and Expense Fund and the expenses of the Receiver who later became trustee in operating the business of the debtor."[6] As we read that decision, the certificate was interpreted to mean that

6. Letter of November 14, 1974, by the Hon. Howard V. Calverley at 6, Record on Appeal at 150.

with the exception of the Referee's Salary and Expense Fund Rottenberg's claim was senior to administrative expenses in *both* the Chapter XI proceeding and the bankruptcy proceeding, except that in both proceedings those administrative expenses which were necessary for the operation of the business would be senior to Rottenberg's claim. As noted earlier, those concerned felt that it would be better to continue the operations of the business so that it could be sold as a going concern. In light of the fact that the $350,000 loan from Rottenberg was obviously going to be used to continue to operate the business, and especially considering the fact that appellant never objected to the continued operation of the business, *see American Anthracite & Bituminous Coal Corp. v. Leonardo Arrivabene, S.A.*, 280 F.2d 119, 123-24 (2d Cir. 1960), we cannot say that this interpretation of the intent of the parties was erroneous as a matter of law.

On the record before us, however, we cannot determine whether those expenses[7] claimed by the Trustee to be senior to Rottenberg's lien were justifiable operating expenses or not. We therefore vacate the decision of the district court and remand the case with instructions to determine the nature of each listed claim and arrange payment as follows:

(1) The liens of secured creditors who are senior to Rottenberg.

(2) As suggested by *White Chemical Co. v. Moradian, supra,* at 1018,[8] those costs of the

7. Including those "extra" payments to Armstrong and NACC of which appellant complains. Brief for Appellant in No. 75-2482 at 10-12.

8. Although the intent of the parties may have been to subordinate §64(a)(1) costs to Rottenberg's lien, *White Chemical* suggests that §344 does not authorize the bankruptcy court to approve such a certificate of indebtedness. 417 F.2d at 1018. As this point was not argued by the parties, we do not feel compelled to depart from the *White Chemical* suggestion.

superceding bankruptcy proceeding listed in §64(a)(1) of the Bankruptcy Act, 11 U.S.C.A. §104(a)(1).

Then, to the extent not covered in (2),

(3) The costs of the Referee's Salary and Expense Fund and those operating expenses incurred in the effort to maintain the business as a going concern, including reasonable fees for the Receiver-Trustee and his counsel in compensation for those services which would necessarily have been performed in the ordinary course of the business.

(4) Rottenberg's lien.

(5) Other fees for the services of the Receiver-Trustee and his counsel[9] and other costs of administration.

The decision of the district court in No. 75-2482 is affirmed in part, reversed in part, and remanded with directions.

The parties shall bear their own costs on appeal.

9. These fees come last per page four of the complaint filed by Trustee Sulmeyer on July 16, 1974, Record on Appeal at 62.

IN THE

Supreme Court of the United States

October Term, 1976
No. 76-1622

IN RE REINER INDUSTRIES, INC., DEBTOR.

MARCUS ROTTENBERG,
Petitioner,

vs.

IRVING SULMEYER, Trustee,
Respondent.

MARCUS ROTTENBERG,
Petitioner,

vs.

INTERNATIONAL FASTENER RESEARCH CORPORATION,
Respondent.

Respondent's Brief in Opposition to Petition for a Writ of Certiorari.

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Respondent's Brief in Opposition to Petition for a Writ of Certiorari.

Opinion Below.

There were two companion appeals heard by the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit decisions are included as Appendix B in Petitioner's Brief. The Petition for Writ of Certiorari appears directed only to the appeal wherein International Fastener Research Corporation was a Respondent (No. 75-2483). Accordingly, this opposing brief, submitted on behalf of Respondent International Fastener Research Corporation, is directed only to the Ninth Circuit decision in 75-2483.

Questions Presented.

1. Did the Court of Appeals commit error in rejecting Petitioner's argument that application of the Bankruptcy Act and Bankruptcy Rules violated his Due Process rights where: a) the Bankruptcy Act and Rules require that an appeal from a Bankruptcy Court order must be filed within ten days (unless extended); b) Petitioner waited until December 24, 1974 before appealing from a Bankruptcy Court order entered on July 30, 1974; and c) the District Court dismissed Petitioner's appeal as being untimely (which dismissal was affirmed by the Court of Appeals)?

2. Is the denial of a request for reconsideration an appealable order?

3. Have subsequent proceedings rendered the issues moot?

Statement of the Case.

Petitioner's statement of the case contains so many false and misleading statements as to what actually transpired, Respondent must necessarily set forth what the record indicates to be the true statement of the case.

In May, 1973, Reiner Industries, Inc. filed a petition under Chapter XI of the Bankruptcy Act and Irving Sulmeyer was duly appointed Receiver. Shortly thereafter, Petitioner loaned $350,000 to the Receiver and received two certificates of indebtedness. Each certificate provided in part that:

> "This certificate is . . . made a lien upon all property of . . . Reiner Industries, Inc. . . . *Said lien shall be subject to presently existing, valid and perfected security interests, trust deeds,*

> *liens and other encumbrances. . . .*" (Emphasis added.)

At the time of the issuance of the certificates, substantially all of the assets of Reiner Industries, Inc. were encumbered with blanket liens and security interests in favor of National Acceptance Company of California and A. J. Armstrong Co., Inc.; accordingly, Petitioner's liens were by the specific terms of the certificates junior to these particular secured creditors as well as certain other secured creditors.

Reiner Industries, Inc. was subsequently adjudicated a bankrupt. Thereafter the Trustee attempted to sell the business as a going concern. On July 2, 1974, a noticed hearing was held for the purpose of receiving bids for the assets of the business. The bids received were, in the view of the Bankruptcy Judge, inadequate. The Bankruptcy Judge then issued an order authorizing the Trustee to "sell said assets at private sale as expeditiously as possible, without further notice." Petitioner was represented by counsel at the July 2, 1974 hearing and was aware of the authorization to sell without further notice. Petitioner did not object to the waiver of further notice.

The Trustee then negotiated an agreement with Respondent whereby Respondent agreed to purchase most of the bankrupt's assets. The agreement provided among other things:

> "The purchase and sale . . . shall be consummated . . . on the first business day following the date upon which the order . . . approving the sale held pursuant to this Agreement becomes final . . . which shall not be later than July 23, 1974. *IFR* [Respondent] *shall have no obliga-*

tions under this Agreement unless the sale herein contemplated is approved by court order no later than July 12, 1974, and such *order becomes final for all purposes no later than July 23, 1974.*" (Emphasis added.)

By the time the details of the contract had been worked out, the Trustee determined he could no longer continue operations pending consummation of the sale. Since it was imperative that operations not be discontinued (because the going concern value would be severely damaged), the Trustee and Respondent agreed that Respondent would take possession of the assets in advance of closing provided Respondent assumed all expenses and obligations in connection with its operation of the business pending closing. Based on this understanding, the Trustee obtained an order of the Bankruptcy Court on July 12, 1974 approving all the terms of the contract of sale (including the condition that Respondent would have no obligations under the Agreement unless the Order became final for all purposes by July 23, 1974), and said order also authorized the Trustee to:

> ". . . deliver immediate possession of said assets . . . to the purchaser forthwith and . . . purchaser shall become responsible for all expenses and obligations in connection with its occupancy of said premises and its *use* of said assets and its *conduct of the bankruptcy estate's business conducted thereon.*" (Emphasis added.)

At the time of the July 12, 1974 order, National Acceptance Company of California and A. J. Armstrong Co., Inc. were owed close to $1,000,000. To avoid having to pay an additional ten days' interest

on these obligations, the Trustee persuaded Respondent to advance $1,000,000 to him so that he could pay off these secured creditors. The advance would ultimately be credited against the purchase price to be paid by Respondent when the July 12, 1974 order became final on July 23, 1974. To induce Respondent to advance the $1,000,000 prior to closing, the Trustee agreed with Respondent that it would be subrogated to the position of these secured creditors so that Respondent would be protected in the event that the sale was not consummated. In reliance upon this agreement, Respondent turned over $1,000,000 to the Trustee and the latter used substantially all of Respondent's money to pay off the secured creditors. As previously mentioned, the secured creditors, to whose positions, lien rights and priorities Respondent became subrogated by agreement with the Trustee, held liens which were senior to the liens created in Petitioner's certificates of indebtedness.

It is to be noted at this point that Petitioner erroneously states in his brief that on July 12, 1974 the sale to Respondent was fully consummated, relying largely upon the fact that Respondent had taken possession of the assets and paid $1,000,000 to the Trustee. This is totally misleading. As to Respondent taking possession of the assets, the July 12, 1974 order expressly authorized the Trustee to deliver immediate possession of the assets even though the sale was not to take place until July 23, 1974. The only condition was that Respondent assume responsibility for obligations incurred in "its conduct of the *bankruptcy estate's business*" during this interim period. As to the payment of $1,000,000 by Respondent to the Trustee, this merely was substitution of one secured creditor for another,

to-wit: Respondent, in place of the other secured creditors who were paid off. This was an interim measure to save the bankruptcy estate further interest expense while protecting Respondent if the sale did not close. Nowhere in the record or the decisions of the courts below is there any support for Petitioner's contention that the sale to Respondent was ever consummated.

On July 22, 1974 Kenneth Reiner, who is Petitioner's nephew and was the former president of the bankrupt, filed a notice of appeal from the July 12, 1974 order. The appeal prevented the July 12, 1974 order from becoming final. By the express terms of the contract of sale quoted above, Respondent had no obligations under the contract unless the order confirming the sale became final no later than July 23, 1974. Mr. Reiner's appeal thus entitled Respondent to rescind the contract.

Although Respondent was entitled to rescind the contract, the Trustee desired to consummate the sale if he could obtain a quick dismissal of the appeal. Accordingly the Trustee contacted Petitioner's California counsel, Allan J. Greenberg, and pleaded with him to try to have Petitioner prevail upon his nephew, Mr. Reiner, to dismiss the appeal and thereby save the sale. Counsel for Petitioner was unable to do so and it became apparent that Petitioner's nephew was intent upon prosecuting his appeal. Respondent was faced with the untenable prospect of purchasing assets for resale without clear title. Accordingly, Respondent rescinded the contract of sale on July 26, 1974. Had Petitioner been able to convince his nephew to dismiss his appeal, the sale to Respondent would have been consummated and subsequent proceedings would not have been necessary.

Since the sale to Respondent was never consummated, the Trustee was faced with having to dispose of the assets and applied to the Bankruptcy Court for an order authorizing the employment of an auctioneer. As mentioned earlier, the July 2, 1974 order authorized the Trustee to sell the assets as expeditiously as possible *without further notice or advertising*. Counsel for Petitioner was present at the hearing *and made no objection to the waiver of notice* with respect to future sales. On July 30, 1974, the Trustee applied for and obtained an order which authorized the Trustee, among other things, to sell the assets by auction through David Weisz Company. Said order also recognized Respondent's rescission of the contract of sale and the subrogation agreement between the Trustee and Respondent which was made on July 12, 1974. Not only did the Trustee advise Petitioner's counsel, Mr. Greenberg, that rescission was imminent unless Petitioner could persuade his nephew, Mr. Reiner, to dismiss the appeal, but more importantly, concurrently with their filing, the Trustee mailed a copy of the July 30, 1974 application and order to Mr. Greenberg. Moreover, the Trustee spoke to Mr. Greenberg within a few days after the July 30, 1974 order was entered and discussed with him the pending auction by the David Weisz Company. (Respondent does wish to point out to the Court that the Ninth Circuit Court of Appeals recognized that there was some dispute as to the extent of Petitioner's notice and assumed, *for purposes of its decision only*, that Petitioner received no notice of the July 30, 1974 order within the statutory time for appeal.)

In any event, by Petitioner's own admission, he was aware of the July 30, 1974 order by August

30, 1974. This was still more than ten days before the auction sale was due to take place. Petitioner or his counsel could have contacted the Trustee or Respondent and informed them of Petitioner's objection to the July 30, 1974 order; this would have afforded the Trustee and Respondent an opportunity to evaluate the advisability of halting the auction sale, thereby preserving the status quo pending a determination of Petitioner's contentions.

Petitioner applied to the Bankruptcy Court for reconsideration of the July 30, 1974 order and a hearing on Petitioner's application for reconsideration was set for November 8, 1974. By the time the Trustee and Respondent were served with copies of Petitioner's application for reconsideration, the auction sale had already taken place and the Respondent had taken irrevocable steps in reliance upon the finality of the July 30, 1974 order.

On December 18, 1974 the Bankruptcy Court entered an order refusing to reconsider the July 30, 1974 order. A copy of the December 18, 1974 order is included herein as Appendix A.

On December 24, 1974 Petitioner filed a notice of appeal to the District Court seeking review of the July 30, 1974 order and also the December 18, 1974 order.

Respondent filed a motion with the United States District Court to dismiss Petitioner's appeals. With respect to Petitioner's appeal from the July 30, 1974 order, Respondent contended that the same was not filed within the time period prescribed by the Bankruptcy Act and Rules promulgated thereunder. With respect to Petitioner's appeal from the December 18, 1974

order, Respondent contended that an order which refuses to reconsider a prior order on the merits is not an appealable order. The District Court concurred with Respondent and dismissed both of Petitioner's appeals.

Petitioner thereafter appealed to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit affirmed the dismissals. (See Petitioner's Appendix B.)

REASONS FOR DENIAL OF PETITION.

THE DECISION OF THE COURT OF APPEALS WAS CORRECT AND THERE ARE NO SPECIAL OR IMPORTANT REASONS REQUIRING REVIEW BY THIS COURT.

A. The Lower Courts Correctly Found That Petitioner Did Not Make a Timely Appeal From the July 30, 1974 Order.

Petitioner did not file his appeal from the July 30, 1974 order until December 24, 1974. The Rules of Bankruptcy Procedure continued the rule formerly embodied in 11 U.S.C. §67(c) that an order becomes final ten days after the entry thereof. The relevant portion of Rule 802(a) states:

> "The notice of appeal shall be filed with the referee within ten days of the date of the entry of the judgment or order appealed from. . .".

Rule 803 provides:

> "Unless a notice of appeal is filed as prescribed by Rules 801 and 802, the judgment or order of the referee shall become final."

The Advisory Committee's Note to this Rule states:

> "This rule preserves the finality of the referee's order on the expiration of the period allowed seeking review, as now provided in §39c of the Act."

Rule 922(a) states:

> ". . . Lack of notice of the entry [of an order] does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 802."

The foregoing establishes that under the Rules of Bankruptcy Procedure an order becomes final for all purposes after the expiration of the ten-day period.

Petitioner contends that he was entitled to notice of the July 30, 1974 order, that he did not receive notice thereof and that the time bar of 11 U.S.C. §67(c) and Rule 802 of the Rules of Bankruptcy Procedure, violates his constitutional rights of due process.

With respect to whether or not Petitioner was entitled to notice of the July 30, 1974 order authorizing the sale, the Ninth Circuit correctly held that Petitioner waived his right to notice. (See Petitioner's Appendix B at 15a.) Specifically, Petitioner was represented by counsel at a hearing before the Bankruptcy Court on July 2, 1974 whereat the Court determined that the offers received at that hearing were inadequate and authorized the Trustee to dispose of the bankrupt's assets without further notice or advertising. Petitioner did not object to the waiver of notice as announced by the Court. Therefore, Petitioner was not entitled to notice of the July 12, 1974 order authorizing the sale agreement to Respondent. Likewise, the Court reasoned, Petitioner was not entitled to notice of the rescission of the sale agreement and authorization of further sale which was a topic of the July 30, 1974 order to which Petitioner takes exception.

Moreover, the Ninth Circuit correctly found that Petitioner was, by his own admission, aware of the July 30, 1974 order at least ten days before the auction sale authorized by that order took place; yet Petitioner failed to file his objection thereto until the day before the auction and the parties involved in the sale were

not notified until after the sale took place. The Court found that under such circumstances, Petitioner should be estopped from asserting his lack of notice. (See Petitioner's Appendix B at 15a.)

With respect to Petitioner's contention that his due process rights were violated, the Ninth Circuit assumed *arguendo, for purposes of its decision only,* that Petitioner had a vested property right which was affected by the July 30, 1974 order and that Petitioner did not receive notice of said order within the statutory appeal period. The Court properly held that due process only requires a reasonable procedure be followed when rights are affected. The Court correctly relied upon the decisions holding that each individual creditor with notice of a bankruptcy proceeding must keep track of those proceedings by constantly checking the record in order to ensure that any order which affects him is properly challenged. The Court held that in the bankruptcy context it is reasonable, in terms of due process, to require a creditor to keep himself informed of the state of the proceedings. *In re St. Cloud Tool & Die Co.,* 553 F.2d 387 (8th Cir. 1976); *In re General Insecticide Co., Inc.,* 403 F.2d 629 (2d Cir. 1968). The ten-day limit for appeals promotes the finality of bankruptcy orders. *In re Abilene Flour Mills Co., Inc.,* 439 F.2d 937 (10th Cir. 1971); *St. Regis Paper Co. v. Jackson,* 369 F.2d 136 (5th Cir. 1966). Without such finality, title to the property of the bankrupt would be clouded and it would be difficult for the Trustee to liquidate the estate for the benefit of all creditors. (See Petitioner's Appendix B at 14a.)

In summary, the Ninth Circuit correctly concluded that Petitioner waived his right to notice and, upon the record, should be held to be estopped from asserting lack of notice. The Court moreover concluded that the procedures prescribed by the Bankruptcy Act and Rules promulgated thereunder did not, in the context of a bankruptcy proceeding, violate Petitioner's due process rights. (See Petitioner's Appendix B at 15a.)

Petitioner's brief also characterizes the July 30, 1974 order as *creating* lien rights in favor of Respondent having priority over those of Petitioner. It should be pointed out that Petitioner advanced this proposition in the lower courts, yet there is nothing in the record to support this contention. Respondent's lien rights were created by agreement between the Trustee and Respondent on July 12, 1974 when Respondent advanced $1,000,000 to the Trustee for the purpose of enabling him to pay off certain secured creditors and halt further accrual of interest against the estate. This was done upon the understanding and agreement that Respondent would "step into the shoes" of those secured creditors who were paid with Respondent's money pending consummation of the sale to Respondent. This was merely a contractual substitution of one secured creditor in place of another. This in no manner affected Petitioner's lien priorities and thus Petitioner's property rights were in no manner affected. The July 30, 1974 order merely noted what had already taken place.

B. The Court of Appeals Was Correct in Affirming the Dismissal of Petitioner's Appeal From the December 18, 1974 Order Denying Reconsideration.

Petitioner sought to have the July 30, 1974 order reconsidered by the Bankruptcy Court. The Court entered an order on December 18, 1974 denying reconsideration. [See Appendix A herein.]

The issue presented to the District Court and the Ninth Circuit was whether the December 18, 1974 order was appealable. There is some authority that if a judge undertakes to reconsider a prior order *on the merits,* the order entered thereupon may be appealable. However, if the judge refuses to reconsider the order *on the merits,* the denial of such a motion for reconsideration is not appealable. *Wayne United Gas Co. v. Owens-Illinois Glass Co.,* 300 U.S. 131, 137-38 (1937); *In re Brendan Reilly Associates, Inc.,* 372 F.2d 235 (2d Cir. 1967). See 2A Collier on Bankruptcy, ¶39.17 at 1487 (14th Ed. 1974). Petitioner contends that although the form of the December 18, 1974 order indicated that the Bankruptcy Judge simply denied his motion, he actually undertook to re-examine the merits of his July 30, 1974 order by taking evidence concerning that order. Petitioner would have this Court believe that the Bankruptcy Judge's ruling was embodied in the letter dated November 14, 1974 included in Petitioner's brief in Appendix A. This is simply not true. This letter was not the court's order. Rather, reference must be had to the language of the December 18, 1974 order for it is the form of this order which determines whether the same constituted a reconsideration of the earlier order. *Pfister v. Northern Illinois Finance Corp.,* 317 U.S. 144, 150-51 (1942). A copy of the December 18,

1974 order denying reconsideration is included herein as Appendix A.

A review of said December 18, 1974 order clearly indicates that the Bankruptcy Judge refused to reconsider Petitioner's motion on the merits. Petitioner would have this Court believe that notwithstanding the language of said December 18, 1974 order, the Judge was somehow tricked into signing the wrong order.

Included herein as Appendix B is a copy of a letter from the Bankruptcy Judge dated December 18, 1974. There was considerable comment and objection by counsel for Petitioner and Respondent in connection with the form that the proposed order would take and it is clear from this December 18, 1974 letter that the Bankruptcy Judge was in no manner tricked or misled. Based upon the record the Ninth Circuit correctly found that the Judge knew precisely what he was doing by not reaching the merits. (See Petitioner's Appendix B at 16a.)

C. Even Assuming Petitioner Was Not Time-Barred From Appealing the July 30, 1974 Order and Assuming That the December 18, 1974 Order Was Appealable, the Questions Are Now Moot.

In connection with the court-approved sale, as authorized by the July 30, 1974 order, the issue is now moot inasmuch as the sale has already taken place. Rule 805 of the Rules of Bankruptcy Procedure provides in pertinent part:

> ". . . unless an order approving a sale of property . . . is stayed pending appeal, the sale to a good faith purchaser . . . shall not be affected by the reversal or modification of such order

on appeal, whether or not the purchaser . . . knows of the pendency of the appeal."

Petitioner did not obtain a stay of the auction sale and the same took place. Consequently any subsequent reversal of the July 30, 1974 order could not affect the sale. Moreover, practically speaking, there is no way that the multitude of purchasers at the auction could be required to return the assets bought by them. Therefore, the questions raised by Petitioner relative to the propriety of the sale authorized by the July 30, 1974 order are moot.

With respect to the lien priorities of Respondent, even assuming that the July 30, 1974 order improperly recognized the subrogation agreement between the Trustee and Respondent which was entered into on July 12, 1974, Petitioner subsequently waived his rights to attack Respondent's lien rights.

Specifically, Respondent initiated an adversary proceeding against the Trustee to enforce its lien rights which emanated out of the July 12, 1974 agreement with the Trustee and confirmed by the Bankruptcy Court on July 30, 1974. Respondent sought permission from the Bankruptcy Court to have certain assets subject to its liens turned over to Respondent and to foreclose its liens on other assets. Petitioner intervened and was a party to said adversary proceeding.

A judgment and order was entered by the Bankruptcy Court on February 27, 1975, granting Respondent leave to foreclose and ordering a turnover of certain assets. At the time said order was entered, the obligations owing to Respondent had been reduced to $408,-682.78. A copy of the February 27, 1975 order is included herein as Appendix C. A complete reading

of said order clearly demonstrates that the same contemplated that Respondent had a first lien upon the assets of the bankruptcy estate senior to Petitioner's liens.

Petitioner then filed a timely notice of appeal from said February 27, 1975 order. However, Petitioner did not pursue his appeal and by reason thereof, the District Court entered an order dismissing Petitioner's appeal for failure to prosecute. Thus, Respondent's senior lien status was reaffirmed by the Bankruptcy Court on February 27, 1975 and Petitioner is bound by this determination under principles of *res judicata*. Therefore, in view of said February 27, 1975 order, whatever might be said relative to the July 12, 1974 subrogation agreement between the Trustee and Respondent (which was acknowledged by the Bankruptcy Court in its July 30, 1974 order) Petitioner's challenge in relation thereto is moot in view of the subsequent February 27, 1975 order which is unassailable.

Conclusion.

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

IRWIN R. BUCHALTER,

Attorney for Respondent, International Fastener Research Corporation.

BUCHALTER, NEMER, FIELDS & CHRYSTIE.

APPENDIX A.

Denial of Application to Reconsider Order of July 30, 1974.

United States District Court, Central District of California.

In the Matter of Reiner Industries, Inc., Bankrupt. No. 73-05066.

Filed: Dec. 18, 1974.

1. On July 30, 1974, this Court made and entered its Order entitled "ORDER DECLARING RESCISSION OF PRIVATE SALE, AUTHORIZING SALE AT PUBLIC AUCTION AND AUTHORIZING AGREEMENT TO COLLECT ACCOUNTS RECEIVABLE AND SELL FINISHED GOODS IN THE ORDINARY COURSE OF BUSINESS."

2. Said July 30, 1974 Order became final on August 10, 1974.

3. On September 9, 1974, MARCUS ROTTENBERG ("ROTTENBERG") made application to this Court seeking reconsideration of said July 30, 1974 Order.

4. A hearing was held before this Court on November 8, 1974 to determine whether or not this Court should reconsider said July 30, 1974 Order.

5. After hearing oral arguments and reviewing the pleadings and briefs on file herein, it appears to this Court that said July 30, 1974 Order should not be reconsidered.

THEREFORE, this Court hereby denies the application of ROTTENBERG and shall not reconsider said July 30, 1974 Order.

The attorneys for International Fastener Research Corporation shall serve copies of this ruling upon the attorneys of record for ROTTENBERG and the TRUSTEE.

At Los Angeles in said District on this 18th day of December, 1974.

/s/ Howard V. Calverley
HOWARD V. CALVERLEY
Bankruptcy Judge

APPENDIX B.

December 18, 1974

Presiding Bankruptcy Judge

Mr. Allan J. Greenberg
Attorney at Law
1880 Century Park East, Suite 1400
Los Angeles, California 90067

Mr. David W. Levene
Attorney at Law
727 West Seventh Street
Los Angeles, California 90017

Re: Reiner Industries, Inc.
Bankruptcy No. 73-05066

Gentlemen:

I have studied the "Denial of Application to Reconsider Order of July 30, 1974" submitted by Mr. Levene in the above-entitled case and the objection thereto filed by Mr. Greenberg.

I have this day signed the "Denial of Application to Reconsider Order of July 30, 1974" as submitted by Mr. Levene because I think it reflects the Court's action better than the Proposed Order of Mr. Greenberg.

As I recall, there was no hearing on the question of whether or not the Court's Order of July 30, 1974 should be reconsidered on October 22, 1974. The hearing on that day was confined to the relative priority between the Trustee's operating expenses and Rottenberg's Receiver's certificates. It was at that hearing that both Mr. Sulmeyer, the trustee, and Mr. Greenberg testified. Hearing on the question of the Court's recon-

sideration of the Order of July 30, 1974 was held on November 8, 1974.

I don't remember that any testimony was given on the question of reconsideration of the order involved. This matter was submitted on the record of the case and was argued at length.

I see no reason to recite the affidavits considered in the order itself. They are a part of the record of the case.

Yours very truly,
HOWARD V. CALVERLEY
Presiding Bankruptcy Judge

HVC/st

APPENDIX C.

Order Granting Leave to Foreclose and Ordering Turnover of Funds.

United States District Court, Central District of California.

In re Reiner Industries, Inc., Bankrupt. International Fastener Research Corporation, Plaintiff, vs. Irving Sulmeyer, Trustee, Defendant. Bankruptcy No. 73-05066.

Filed: Feb. 27, 1975.

This matter came on for hearing before the undersigned Bankruptcy Judge on February 18, 1975, at 2:00 o'clock P.M., pursuant to the Complaint of International Fastener Research Corporation (hereinafter referred to as "IFR") and the Summons and Notice of Trial issued pursuant thereto and also pursuant to the Order dated February 15, 1975, permitting Marcus Rottenberg to intervene. The Trustee in Bankruptcy, Irving Sulmeyer, having appeared personally and having been represented by and through his counsel of record, Haskell H. Grodberg, IFR having appeared by and through its attorneys of record, Buchalter, Nemer, Fields & Savitch, a Professional Corporation, by Irwin R. Buchalter and Jerry Nemer, and Marcus Rottenberg having appeared by and through his attorney of record, Allan J. Greenberg, and it appearing that due notice of said hearing was given, and based upon the representations made in open Court by the Trustee that he has no defense to the Complaint and has no objections to permitting foreclosure and turnover upon the conditions which IFR indicated were agreeable and acceptable to it, and based upon the representations of IFR as to the terms and conditions of turnover and foreclosure to which it has no objection, it appear-

ing that those terms and conditions are in substantial respects beneficial to the bankrupt's estate, findings of fact and conclusions of law not being required as no evidence was produced by way of the parties but nevertheless having been waived by the Trustee and IFR, and further based upon the Trustee and IFR agreeing in open Court that this Order being entered herein will be without prejudice to the rights of Marcus Rottenberg, and other good cause appearing therefor, IT IS HEREBY ORDERED, ADJUDGED and DECREED as follows:

1. IFR through its attorneys, Buchalter, Nemer, Fields & Savitch, a Professional corporation (hereinafter referred to as "BNF&S"), shall continue its efforts to collect remaining outstanding accounts receivable created either during the period of the Chapter XI proceeding or the superseding bankruptcy proceeding. Pursuant to the prior order of this Court authorizing Trustee to employ special counsel, said collection effort shall be without expense to the Trustee or IFR for attorneys' fees. The only deduction made from the amount collected shall be the actual costs expended by IFR in connection with said collection effort. The exact funds collected from those efforts to date (which are approximately $35,000.00) shall be credited by IFR in reduction of the bankrupt's estate current secured indebtedness to IFR which is deemed to be $408,-682.78. All future collections shall be similarly delivered by BNF&S to IFR, in reduction of said indebtedness.

Said collection effort by BNF&S shall continue for a period of ninety days. Within ten days thereafter, BNF&S shall account to the Trustee herein for the gross amount collected, the costs and expenses incurred in such collection, and the net amount of such collections turned over to IFR. At the same time IFR shall cause to be delivered to the Trustee a list of the remaining accounts and the invoices and other documents which may be in the possession of IFR substantiating the remaining accounts, which such accounts shall thereupon be deemed to be vested in the Trustee herein free and clear of any claim or lien of IFR and the Trustee herein shall be free to either pursue said accounts enough to collect the same or take such other action with respect thereto as he deems appropriate and in the best interest of creditors.

2. From the funds presently in the bankruptcy estate, the Trustee shall forthwith deliver and pay to IFR the sum of $130,000.00, in further reduction of the indebtedness of the bankruptcy estate to IFR.

3. IFR be and hereby is authorized to proceed forthwith to foreclose upon all of the bankruptcy estate's right, title and interest in and to any and all trademarks, trade names, licenses, patents, patents pending, and designs which have not previously been sold, including but not limited to patents, patents pending, designs, and licenses relating to the Klippie line and the use of the name Klippie and any and all jigs, tools, dies, raw materials, work in process, scrap, supplies and

inventory still remaining in the bankruptcy estate. Said foreclosure may be either by public or private sale conducted pursuant to the Uniform Commercial Code as adopted in the State of California, provided, however, that upon completion of such foreclosure, IFR shall credit against the balance then owing to it from the bankruptcy estate the sum of $100,000.00, or the net amount realized by IFR from said foreclosure, whichever sum is greater.

4. IFR shall retain its presently existing liens on the assets of the bankruptcy estate to the same extent and with the same priority as it presently holds same to secure the balance still owing to it by the bankruptcy estate, which said liens include but are not limited to a lien upon that certain real property, the description of which is set forth in Exhibit "A" attached hereto and incorporated herein by this reference. The Trustee herein shall use his best efforts to cause said real property to be sold within one year from the date of this order. In the event said real property is sold, the first proceeds therefrom, after the direct expenses of sale and payment of taxes entitled to priority, if any, shall be paid by the Trustee to IFR concurrently with such sale in an amount sufficient to satisfy in full the balance then owing to IFR and in satisfaction of IFR's lien against said real property. In the event the Trustee cannot sell the real property within said one year period, IFR is and shall be entitled to proceed to foreclose upon said real property pursuant to the laws of the State of California.

This Order is entered without prejudice to the rights of Marcus Rottenberg or any other rights of IFR not specifically provided for herein.

At Los Angeles, California, in said District this 27th day of February, 1975.

/s/ Howard V. Calverley
HOWARD V. CALVERLEY
Bankruptcy Judge

Approved as to Form and Substance:
Irving Sulmeyer, Trustee
INTERNATIONAL FASTENER RESEARCH CORPORATION

By
of Buchalter, Nemer, Fields & Savitch

Disapproved

/s/ Allan J. Greenberg
ALLAN J. GREENBERG,
Attorney for Marcus Rottenberg

EXHIBIT "A"

[Exhibit "A" is merely a legal description of real property and is omitted for brevity.]

APPENDIX D.

STATUTES:

11 U.S.C. 67c

c. A person aggrieved by an order of a referee may, within ten days after the entry thereof or within such extended time as the court upon petition filed within such ten-day period may for cause shown allow, file with the referee a petition for review of such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing. Such petition shall set forth the order complained of and the alleged errors in respect thereto. Unless the person aggrieved shall petition for review of such order within such ten-day period, or any extension thereof, the order of the referee shall become final. Upon application of any party in interest, the execution or enforcement of the order complained of may be suspended by the court upon such terms as will protect the rights of all parties in interest.

BANKRUPTCY RULES:

Rule 802(a)

(a) *Ten-Day Period.* The notice of appeal shall be filed with the referee within 10 days of the date of the entry of the judgment or order appealed from. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 10 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this rule, whichever period last expires.

Rule 803

Unless a notice of appeal is filed as prescribed by Rules 801 and 802, the judgment or order of the referee shall become final.

Rule 805

A motion for a stay of the judgment or order of a referee, for approval of a supersedeas bond, or for other relief pending appeal must ordinarily be made in the first instance to the referee. Notwithstanding Rule 762 but subject to the power of the district court reserved hereinafter, the referee may suspend or order the continuation of proceedings or make any other appropriate order during the pendency of an appeal upon such terms as will protect the rights of all parties in interest. A motion for such relief, or for modification or termination of relief granted by the referee, may be made to the district court, but the motion shall show why the relief, modification, or termination was not obtained from the referee. The district court may condition the relief it grants under this rule upon the filing of a bond or other appropriate security with the referee. A trustee or receiver may be required to give a supersedeas bond or other appropriate security in order to obtain a stay when taking an appeal. Unless an order approving a sale of property or issuance of a certificate of indebtedness is stayed pending appeal, the sale to a good faith purchaser or the issuance of a certificate to a good faith holder shall not be affected by the reversal or modification of such order on appeal, whether or not the purchaser or holder knows of the pendency of the appeal.

Rule 922(a)

(a) *Judgment or Order of a Referee.* Immediately upon the entry of a judgment or order made by him, the referee shall serve a notice of the entry by mail in the manner provided by Rule 705 upon any party who opposed the making of the judgment or order and on such other persons as may be designated by

the referee. The service of such notice shall be noted in the referee's docket. Lack of notice of the entry does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 802.

In The

Supreme Court of the United States

October Term, 1976

No. 76-1622

IN RE REINER INDUSTRIES, INC., DEBTOR.

MARCUS ROTTENBERG,

Petitioner,

vs.

IRVING SULMEYER, Trustee,

Respondent.

MARCUS ROTTENBERG,

Petitioner,

vs.

INTERNATIONAL FASTENER RESEARCH CORPORATION,

Respondent.

PETITIONER'S REPLY BRIEF IN FURTHER SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Respondent.

PETITIONER'S REPLY BRIEF IN FURTHER SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

This brief replies to the brief of respondent International Fastener Research Corporation ("IFR"), and supports the petition of petitioner Marcus Rottenberg ("Rottenberg") for a writ of certiorari.

The February 25, 1975 order (Appendix C to IFR's opposing brief) did not render moot the questions presented in the petition.

The Court is respectfully referred to Appendix C to IFR's opposing brief, which is a February 25, 1975 order claimed by IFR to render Rottenberg's petition moot.

After Rottenberg appeared in the proceeding between IFR and respondent Irving Sulmeyer ("Sulmeyer") underlying said order, IFR and Sulmeyer agreed in open court that said order be entered "without prejudice to the rights of Marcus Rottenberg" (Appendix C, pages 6 and 9). Rottenberg was then in the process of appealing from the orders ultimately giving rise to the petition for a writ of certiorari herein under consideration. That express reservation of Rottenberg's rights agreed to by IFR in open court plainly negates the "rendered moot" status now claimed by IFR. Moreover, Rottenberg's rights in and to the proceeds of the sale contemplated by said February 25, 1975 order were reserved therein.

Respondent IFR's brief glosses over, and in material part fails entirely to mention in its relation of the relevant facts, the surreptitious *ex parte* acts of respondent Sulmeyer, Trustee in Bankruptcy, accomplished on behalf of IFR which effectively deprived Rottenberg of property rights without constitutional due process.

The July 30, 1974 *ex parte* order allowed IFR to rescind a sale completed under the terms of a July 12, 1974 agreement

between IFR and Sulmeyer. Under that agreement, IFR was to pay $862,000 to the Trustee for specified assets of the bankrupt, and to loan $138,000 to the Trustee. The Trustee was to convey and deliver those assets to IFR and turn over the bankrupt's manufacturing facility to IFR for IFR's use and benefit. IFR paid the purchase price, made the loan and received the property on July 12, 1974. No other contract obligation remained to be performed. The agreement provision allowing IFR not to perform its contract obligations if the July 12, 1974 order did not become final on July 23, 1974 was rendered academic by said fully executed performance on July 12, 1974.

IFR's brief (page 5, lines 7-8) refers to an alleged subrogation agreement between IFR and Sulmeyer. This is the same alleged oral, contingent, retroactively effective, subrogation agreement which IFR has claimed had existed throughout Rottenberg's challenge below of the constitutionality of the July 30, 1974 *ex parte* order. Yet even the Bankruptcy Judge rejected the existence of such alleged agreement after argument, *sub silencio,* when he relied solely upon California equity law (Appendix A to Petition, page 4a) in upholding the subrogation rights created in the July 30, 1974 *ex parte* order in favor of IFR.

Rottenberg's legal status entitled him to constitutional procedural due process and his lien rights could not lawfully be affected by the inapplicable Bankruptcy Rule 802.

IFR's brief relies upon the Ninth Circuit's decision (Appendix B at 14a) which sets forth the general principle that it is impracticable for notice to be given to every creditor affected by bankruptcy orders.

However, in the case at bar, Rottenberg loaned money to the Chapter XI Receiver of Reiner Industries, Inc. ("Reiner"), never was a creditor of Reiner, was not involved in or with the

ensuing bankruptcy proceedings, and had no occasion or duty to keep abreast thereof by constant resort to the court files. Bankruptcy Rule 802 was inapplicable to him. Rottenberg's only interest was in being paid by Sulmeyer with proceeds of the consummated sale to IFR. That was to be accomplished in the adversary proceeding commenced by the Trustee on July 24, 1974. Rottenberg had every reason to believe that the July 12, 1974 order confirming the sale to IFR had become final on the last mentioned date. The Trustee, on behalf of IFR, continued to foster that belief by his letter to Rottenberg's attorney sent on July 29, 1974 and received on July 30, 1974. In that letter, the Trustee assured Rottenberg's attorney that he would be kept advised of all proceedings, and that the priorities among Rottenberg and Reiner's creditors in the sales proceeds and in Reiner's remaining assets would be determined in the hearing to take place on August 30, 1974. On the very same day, however, the Trustee was petitioning the court on behalf of IFR to rescind the sale, *ex parte*, so that Rottenberg would not find out about it.

CONCLUSION

Under these circumstances, it is respectfully urged that the petition for a writ of certiorari should be granted. Rottenberg's rights attached not only against Reiner's assets, but against the proceeds of sale thereof as well, and he can still be made whole.

Respectfully submitted,

A. WALTER SOCOLOW
EDWARD M. BERMAN

ALLAN J. GREENBERG and
A. WALTER SOCOLOW
Attorneys for Petitioner